

Seneca Nation of Indians

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PRESIDENT'S OFFICE

September 1, 2006

Office of Indian Energy and Economic Development
Attention: Section 1813 ROW Study
Room 20, South Interior Building
1915 Constitution Avenue, NW
Washington, DC 20245

Re: Comments of the Seneca Nation of Indians on the Departments of the
Interior and Energy Draft Section 1813 Rights-of-Way Report

To Whom It May Concern:

On August 7, 2005, the *Energy Policy Act of 2005*, P.L. 109-58, was enacted. Section 1813 of this Act requires the Departments of the Interior and Energy (Departments) to conduct a study on energy rights-of-way (ROW) on Indian nation lands and report back to Congress no later than one year after the date of enactment. On August 7, 2006, the Departments released a draft report and sent notice that the Departments would be holding several public and tribal consultation meetings to receive further comments and suggestions on the draft report for purposes of finalizing it and submitting it to Congress.

This letter provides the comments of the Seneca Nation of Indians (the "Nation") on the draft report. Specifically, this letter provides: (1) a summary of the main options presented in the draft report, (2) some background information on the Nation's unique authorities under treaty and federal laws to grant leases, easements and rights-of-way that do not require federal approvals, and (3) the Nation's specific comments to the content of the draft report.

I. Summary of Draft Report

The draft report found that under existing law and regulations, difficulties can arise in ROW negotiations between Indian nations and energy companies. Nonetheless, the draft report

concludes that these difficulties are unlikely to lead to significant cost impacts for energy consumers or significant threats to the physical delivery of energy supplies to market areas. With that perspective in mind, the Departments list a range of options for parties to consider with regard to ROW negotiations. Among the options, the Departments provide non-legislative action items and options Congress *could* consider if it concludes that these negotiation difficulties merit a legislative solution.

Non-Legislative Options for Consideration

- a. Develop comprehensive ROW inventories for tribal lands;
- b. Develop model or standard business practices for energy ROW transactions;
- c. Broaden the scope of energy ROW negotiations (this recommendation suggests changing the negotiation techniques utilized by business and Indian nations); and,
- d. Develop an industry-tribal ROW institute designed to advance and support energy ROW agreements on tribal lands, which could provide best practices standards, training, and dispute resolution.

Legislative Options for Consideration

The following provides options, proposed by the draft report, that Congress *could* consider if it concludes that a legislative solution is merited.

- a. Congress could elect no change, allowing ROW negotiations to continue under current laws, regulations, practices, and procedures;
- b. Congress could establish a legislative clarification of tribal consent that states that consent is required from any Indian nation for an energy ROW crossing that nation's lands and otherwise affirm the principles of tribal sovereignty and self-determination;
- c. Congress could authorize the federal government to determine fair compensation by directing a federal entity to determine fair compensation for all energy ROWs across tribal land;
- d. Congress could require binding valuation or arbitration to resolve any impasse that may result in negotiations; and
- e. Congress could specifically authorize condemnation of tribal lands for public necessity.

II. Seneca Nation's Unique Authority to Grant Leases, Easements and ROW

The draft report either overlooked or completely disregarded the long-recognized authority of the Nation to grant leases, easements and ROW across its restricted fee lands without requiring federal approval. The Historical Research Associates, Inc., report that appears as an appendix to the draft report also either overlooked or disregarded this authority in the historical section of its report (presumably because HRA's report was focused on case studies of certain Indian nations other than the Seneca Nation). So that the final report may include appropriate language reminding the Congress what it has long acknowledged, we provide this brief overview.

The Seneca Leasing Act of 1950, 64 Stat. 442 (Act of Aug. 14, 1950) authorizes the Seneca Nation to collect and disburse all monies generated from the lease of land within the Allegany, Cattaraugus, and Oil Springs Territories. Section 5 of the Leasing Act also recognizes the Nation's authority to lease its restricted fee lands without requiring federal review and approval. Subsequent amendments to the Leasing Act further expressly recognize this authority as encompassing grants of easements and ROW across the Nation's restricted fee lands. The Leasing Act builds upon prior Congressional recognition of the Nation's independent leasing authority acknowledged in the Act of February 19, 1875 with respect to lands within the City of Salamanca and within the congressional villages.

Furthermore, the Seneca Nation Land Claims Settlement Act of 1990, 25 U.S.C. § 1774 et seq. ("Settlement Act"), ratified a settlement agreement between the City of Salamanca and Seneca Nation regarding leases within the City of Salamanca and the congressional villages. Among other things, the Settlement Act addresses certain leases within the City of Salamanca and the congressional villages under the terms of the settlement agreement. Section 5 of the Settlement Act further acknowledges that the Seneca Nation is solely responsible for negotiation and approval of such leases. The same subsection states that approval of Nation leases is not required and that the United States shall not serve in a capacity to approve such leases.

III. Additional Comments

Comment #1 -- Any federal policy changes must take into consideration the Nation's unique authority.

In the Leasing Act and the Settlement Act, Congress carefully considered and recognized the unique history and status of the Nation and its Territories, as well as the Nation's longstanding authority to negotiate, approve and manage the leasing process within its restricted fee land holdings, free from federal supervision or interference. Indeed, the Settlement Act expressly states that the Secretary shall not be required to and shall not approve leases of the Nation's lands. As a result, the panoply of general federal laws enacted in 1948 authorizing and

requiring Secretarial approval for grants of lease, easement and rights-of-way interests in tribal lands (e.g., 25 U.S.C. §§ 323-328) are inapplicable to the Nation and its lands.

The final report should recognize the Nation's unique authority. Moreover, any legislation that may be proposed as a result of the draft report should not interfere with the Nation's unique leasing authorities long-recognized under federal law.

Comment #2 – Indian nations should develop comprehensive ROW inventories for their lands.

In the late 1980s, by act of a tribal ordinance, the Nation underwent a time consuming and costly project of inventorying its existing ROW. By understanding the existence of ROW, illegal or otherwise, the Nation was better able to account for its assets and renegotiate agreements. The Nation believes developing comprehensive ROW inventories for tribal lands is a positive undertaking for tribes and industry alike. This is a costly endeavor, and the final report should include a recommendation that Congress appropriate to the Interior Department sufficient funding for the research necessary to develop and maintain such an inventory, and should include a reasonable and measured estimate of the additional funding amount needed to do so.

Comment #3 -- Congress should elect no substantive change in the law, allowing ROW negotiations to continue under current laws, regulations, practices, and procedures.

The draft report found that nearly all parties from all perspectives recognized the inherent sovereignty of Indian tribes and supported federal policies of tribal self-determination. In recognition of tribal sovereignty, the final report should clearly advocate that Indian nations should be permitted to manage ROWs located on their lands. The final report should also expressly recommend that Congress take no action that would undercut or otherwise interfere with the Nation's management of ROWs located on its lands. From the practical side of self-governance, Indian nations are in the best position to protect their natural and cultural resources, including sacred sites, and therefore should remain in the position of negotiating ROW agreements.

Comment #4 – Each Indian nation's lands are unique making universal ROW standards untenable.

The draft report reflects that industry is pressing for uniform standards for valuing energy ROWs on tribal lands, possibly similar to those used in eminent domain proceedings. The draft report also reflects that industry commented that the insistence of Indian nations that they provide consent to energy ROWs on their land, without a uniform and measurable standard for

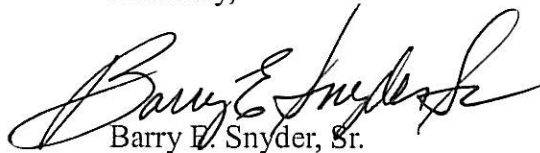
valuing ROWs, creates a high degree of uncertainty for the United States' energy infrastructure and consumer energy costs. The draft report discredited this suggestion.

A standard valuation method would interfere with an Indian nation's ability to exercise self-determination and manage its energy resources. Such a proposal does not take into account the diversity of Indian country. The current negotiation process between an Indian nation and an energy company is an appropriate basis for determining energy ROW valuation. Proposals for uniform valuation are regressive and reflective of previous discredited federal Indian policies that resulted in economic harm to Indian country.

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Thank you for your consideration of these comments. If you should have any questions regarding this matter, do not hesitate to contact Deputy Counsel Christopher Karns at (716) 945-1790 x.3062.

Sincerely,

A handwritten signature in cursive script, reading "Barry E. Snyder, Sr.", written in dark ink.

Barry E. Snyder, Sr.
President